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THE PARENTAL RIGHT TO CONTROL THE RELIGIOUS EDUCATION OF A CHILD

I

THE sixteenth century in England was a period of armed religious strife in which Catholics and Protestants alike, when a suffering minority clamored for liberty of conscience, and when in power proscribed every creed but their own. As Protestantism slowly forged victory out of the conflict it secured itself in the ascendency by various repressive statutes against Catholicism. As early as 1590 the Elizabethan government aimed at the suppression of Catholic education by enacting that only schoolmasters who repaired to the Established Church might be maintained,[1] followed four years later by a further statute which punished as a *præmunire* the sending abroad of a child for Catholic education.[2] From time to time further laws[3] were passed to render more effectual the suppression of Catholic education, until by 1699 it was a crime punishable by perpetual imprisonment for any Papist to keep school or assume the education of youth.[4]

Naturally during this period, in the face of such public sentiment and of such laws there was little or no litigation in the courts of England on the part of Catholic parents to protect any parental rights in relation to their children. Indeed the temper of the courts, reflecting this prevalent spirit of religious intolerance, is well illustrated by their action in *Shaftsbury* v. *Hannam*,[5] where upon an insinuation by counsel for the plaintiff that the defendant was a Papist, although "utterly denied" by her, an order was entered that unless Lady Hannam "dispose herself to receive the

[1] 23 ELIZ. 1.

[2] 27 ELIZ. 2.

[3] Sic: 1 JAC. I, c. 4; 3 CAR. I, c. 2; 13 & 14 CAR. II, c. 4. See 2 BACON ABR. Tit. Papists & Popish Recusants.

[4] 11 & 12 WM. III, c. 4. No attempt is made to cover any of the side currents of religious conflict between Protestant sects such as the struggle between the Church of England and Non-Conformists. Sic: Five Mile Act. 13 & 14 CAR. II, c. 4, etc., etc.

[5] Finch 323 (1677).

Sacrament according to the rites of the Church of England, before the end of the next term, and produce a legal certificate thereof, the court would then consider to remove the infant into such hands as might secure his education in the Protestant religion."

In order to stimulate the conversion to Protestantism of Catholic children the Act of 1699 [6] compelled Catholic parents to support their Protestant children. In 1701 St. Andrew's Undershaft Parish in London sought to compel a Jew to maintain a daughter whom he had turned out-of-doors because she had embraced Christianity. The action [7] failed because it was held not to come within any existing statute. Thereupon in the same year a further statute was passed obliging Jews to maintain and provide for their Protestant children,[8] and the following year a similar provision was incorporated in the anti-Catholic act applying the same principle to Catholics and their Protestant children in Ireland.[9] To what lengths the court was prepared to go under such statutes to stimulate proselytizing is shown when they awarded a Christian daughter forty-four years of age, and married, maintenance out of her Jewish father's estate even after his death.[10] In the zeal to uphold Protestantism family ties cut no figure. The court did not hesitate to deprive a widow of the custody of her minor children so that they might be brought up Protestants, although both parents had always been Catholics.[11] Even when a Catholic mother was bringing up her son as a Protestant according to the wishes of her late husband the court was so blind to all considerations except the possible dangers to the child's Protestant religious education in such a situation that it ordered the separation of the mother and her child of seven years.[12] Marriage to a Catholic of a Protestant widow, even though she continued a Protestant, was considered sufficient to justify depriving her of custody of her daughter.[13]

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[6] 11 & 12 WM. III, c. 4, § 7.

[7] Inhabitants St. Andrew *v.* De Breta, 1 Ld. Raym. 699 (1789).

[8] 1 ANNE 30.

[9] 2 ANNE 6.

[10] Vincent *v.* Farnandez, 1 P. Wms. 524 (1718). See also Moses *v.* Moses, 1 Sander's Orders in Ch. 457 (1723) & 524 (1727).

[11] Preston *v.* Ferrard, 4 Bro. P. C. 298 (1720).

[12] Teynham *v.* Lennard, 4 Bro. P. C. 302 (1724); 9 Mod. 40, 2 Eq. Cas. abr. 486.

[13] "By reason that she had married a Papist." Edwards *v.* Wise, Barnard, ch. 139 (1740).

Toward the middle of the eighteenth century, when the Protestants felt themselves secure in their power, while the statutes themselves were not repealed, the rigorous insistence on anti-Catholic extremes in the courts began to relax. In 1729 Lord Chancellor King refused to punish in chancery a guardian because he had allowed his ward to be educated a Roman Catholic,[14] and in 1756 Lord Hardwicke took the position that while the Chancery Court can refuse to appoint Papists guardians, there was no law to take a guardianship away from them.[15] By 1765 Blackstone wrote: "What foreigners who only judge from our statute-book are not fully appraised of (is) that these laws are seldom exerted to their utmost rigor." [16] Once sown, the seeds of a liberal and enlightened point of view of the conflicting claims of rival religions took sure root in the courts and grew steadily until by Lord Eldon's time, with the evident approval of the bar and bench, he was able to turn his back squarely on the old precedents [17] and take the position that the court looked with equal favor on all religions.[18]

From this time on the courts have been able to maintain a rational judicial attitude toward religious controversies and the religious aspect of the legal relationship of parent and child and of guardian and ward has been allowed to develop along definite legal principles.

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[14] *Ex parte* Hales, Mos. 249 (1729).

[15] Blake *v.* Leigh, 1 Ambl. 306 (1756).

[16] BL. COMM., bk. IV, c. 4, p. 57.

[17] "Lord Bathurst made an order to prevent a Protestant child from being sent to a Roman Catholic school. This court, with reference to the distinction between Protestants and Catholics, interfered *then* in the education of children in many cases in which it would not interfere *now*." Wellesley *v.* Beaufort, 2 Russ. 1, 22 (1827).

[18] Lyons *v.* Blenkin, Jac. 245 (1821).

Vice Ch. Leach on an application to appoint guardians raised a question whether of those named in a will the Duke of Norfolk might be an improper person because he was a Papist. Lord Eldon took the position that the law had changed. Elwes *v.* Const., 1 Mod. Eq. 435 n. The modern liberal doctrine is perhaps most succinctly put by Sir John Romilly. "In the matter of religion, the court holds that the Roman Catholic faith and the Protestant faith are to this extent equally beneficial to the child." Austin *v.* Austin, 34 Beav. 257, 263 (1865). It was, however, left unchallenged that Christianity is part of the law of the land; (Da Costa *v.* De Pas, 1 Amb. 228 (1754)), and this doctrine was so held until overthrown in the mid-Victorian period. Reg. *v.* Bradlaugh, 15 Cox. C. C. 217 (1883). At the same time Lord Eldon recognized that it was lawful for a Jew to educate his children as Jews. Villareal *v.* Mellish, 2 Swan. 533 (1819).

II

While it is now generally recognized that no duty is imposed upon parents to educate their children in any particular phase of religious opinion the English courts have recognized that "one of the first and most sacred duties of the parents is to imbue the mind of the children with some religious belief, and this is done, not merely by precept and instruction, but by the unconscious influence of everyday life and conduct." [19] The court which deprived the poet Shelley of his children because he avowed himself an atheist [20] will probably to-day still regard a parent who refuses all religious instruction to a child as having forfeited all rights to the custody and training of the child.[21]

It has been laid down as the law of parent and child that "*Religio sequitur patrem.*" Like many maxims, this is a glittering half truth that advances the discussion little. How far does it follow? In what way is it to follow? Indeed experience shows that in many instances it follows only by coming out in quite the opposite direction.

In applying a general rule that the father has the right to choose in what religion his child shall be educated the judges have divided themselves into two well-defined groups. This has been done quite unconsciously. Indeed the courts have failed to recognize the

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[19] F *v.* F. [1902] 1 Ch. 688.

[20] Shelley *v.* Westbrooke, Jac. 266 (1821).

[21] By separation deed a father agreed that the infant daughter should remain with the mother eleven months each year and the mother refused to allow her child to receive religious instruction. The father did not interfere. The Court of Chancery Appeals (per James, L. J.) in denying the mother custody laid down the principle:

"It would be impossible for the court to allow its ward, a Christian child, the child of a Christian father, baptized in the Christian Church, to remain under the guardianship and control of a person who professes and teaches and promulgates the religious, or anti-religious, opinions which the Appellant avows that she professes and intends to persevere in teaching and promulgating. We have nothing to do with the strength of the conscientious motives by which, as she alleges, she is impelled so to profess, teach, and promulgate. In the absence of the father (the father being assumed to be practically absent) the court is the real guardian of the infant and must perform its duty to the ward accordingly, and, if necessary, wholly irrespective of the convictions or wishes of the mother and by separating the child from her. It is a plain, imperative duty which the law casts on the court; it is the plainest right of the infant ward. The same duty and the same right would exist if the child were the child of a Jew, a Parsee, a Mahomedan, or Buddhist." *In re* Besant, L. R. 11 Ch. D. 508, 519 (1878).

distinction between the precedents which they cite and the rule of law which they have recognized and differently interpreted in practice. It is commonly laid down that the court will enforce the wishes of the father as to the religious education of his children unless there is a coercive reason for disregarding them.[22] The first class of cases hold that nothing short of an abandonment or forfeiture of this right on the part of the father justifies a court to direct a child educated in any other religion than that of its father. All other considerations play a minor part.[23] Not merely do these courts give effect to the expressed wish of the father,[24] but in the absence of any expression on his part create a presumption that it is his desire that his surviving minor child shall be educated in the religion which he professed even though he neglected it.[25] So hard and fast do the cases in this class construe this rule of law that the right is enforced even when the result is "to

[22] The authority of a father to guide and govern the education of his children "is not to be abrogated or abridged without the most coercive reason." *In re* Meades, 5 Ir. R. Eq. 98 (1870).

[23] "In no case, however, that I am aware of, where the father has been alive, has the court disregarded his wishes concerning the religious education of his children, unless, as in this case, he has been himself a man so ill-conditioned and of such bad conduct that the court thought fit altogether to deprive him of the custody of his children." *In re* Newton, [1896] 1 Ch. 740, 748 (per Lindley, L. J.); *In re* McGrath, [1893] 1 Ch. 143; *In re* Scanlan, Infants, L. R. 40 Ch. D. 200 (1888); Skinner *v.* Orde, L. R. 4 P. C. 60 (1871); F. *v.* F., [1902] 1 Ch. 688; *In re* Montague, L. R. 28 Ch. D. 82 (1884); *In re* Walsh, 13 L. R. Ir. 269 (1884).

"The law unquestionably does give great weight to the right of a father to have his children educated in his own religion both during his lifetime and after his death; and if a father has done nothing to forfeit or abandon his right to have his child educated in his own religion, we think that the court cannot refuse to order a child to be educated in the religion of its father because it thinks that the child would be more happy and contented, and possibly be better provided for by its mother's relations." Andrews *v.* Salt, L. R. 8 Ch. App. 622, 638 (1873).

[24] Talbot *v.* Shrewsbury, 4 My. & C. 672 (1840); *In re* Newbery, L. R. 1 Eq. 431 (1865); Davis *v.* Davis, 10 W. R. 245 (1862); *Re* Chillman's Infants, 25 Ont. R. 268 (1894); *In re* Kellers, 5 Ir. Ch. 328 (1856).

[25] Matter of North, 11 Jur. 7 (1847); *Re* Faulds, 12 Ont. L. R. 245 (1906); *In re* Sparrow, 20 N. S. W. W. N. 42 (1903); *In re* Grey, [1902] 2 Ir. 684.

"The wishes of the father if not clearly expressed by him must be inferred from his conduct. If the father is dead it will be naturally inferred that in the absence of evidence to the contrary his wish was that the children should be brought up in his own religion; that is, the religion which he professed. This inference is one which the court in the absence of evidence to the contrary is bound to draw, and is practically not distinguishable from a rule of law to the effect that an infant child is to be brought up in its father's religion unless it can be shown to be for the welfare of

create a barrier between a widowed mother and her only child; to annul the mother's influence over her daughter on the most important of all subjects, with the almost inevitable effect of weakening it on all others; to introduce a disturbing element into a union which ought to be as close, as warm, and as absolute as any known to man; and lastly to inflict severe pain on both mother and child." [26]

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the child that this rule be departed from, or the father has otherwise directed." *In re* McGrath, [1893] 1 Ch. 143, 148.

". . . there may be a difference of opinion as to whether the rule of law is really such as it is desirable to have in the case where the mother is of a different religion from the father, and the father has died without giving any express directions as to the religion in which the child is to be brought up. I can quite conceive that many persons might think that it would be for the interest of the child in such cases that the mother should be allowed to educate the child in her own religion; but that is not the rule of law. The rule of law is, that the religion of the father is to prevail over the religion of the mother, even in such a case. . . ." Hawksworth *v.* Hawksworth, L. R. 6 Ch. App. 539, 544–5 (1871).

"It was further said that the rule of law had its origin in the statutory power of the father to appoint guardians to the children; and that inasmuch as the mother has now co-ordinate power to this respect with the father, she ought now to have co-ordinate power with him in directing the religious education of the children. No doubt the power of the father to appoint guardians of the children afforded the means by which he was enabled to give effect to his views on their religious education; but I think that it cannot be said that it has been conclusively decided that the rule originated in the way alleged. The point was argued and considered in the case of Skinner *v.* Orde (Law Rep. 4 P. C. 60); and Lord Justice James, in delivering judgment, says no more than this (Law Rep. 4 P. C. 70): 'It was contended with some plausibility before their Lordships that this rule had its origin in the statutory power of English fathers to appoint guardians for their children.' This appears to me sufficient to show that the rule was not (even in the view of lawyers) so connected with the power of appointing guardians that the Legislature ought to be deemed to have abrogated it merely by conferring on the mother the power of appointing guardians; nor can I suppose that in a matter of so much difficulty and delicacy, the Legislature intended to abolish a well-established rule by a side wind, without even a suggestion as to the rule to be substituted for it, and without indicating how a court is to act when called upon to decide between co-ordinate authorities unhappily unable to agree on a question affecting the religious welfare of an infant." *In re* Scanlan, Infants, L. R. 40 Ch. D. 200, 214 (1888).

"It seems a strange extension of the father's rights when he is in his grave, to allow his expressed wishes, and still more his merely presumed wishes to override the rights of the living parent." Hawksworth *v.* Hawksworth, L. R. 6 Ch. 540 (1871).

[26] Per Wickens, V. C., Hawksworth *v.* Hawksworth, L. R. 6 Ch. 539, 540 (1871).

"When a father has not forfeited or abandoned his right to educate his children in his own religion the court cannot refuse to order a child to be educated in that religion merely because it thinks that the child will be more happy and contented, or better provided for, if left with those who have had the care of it." *In re* Marshall, 33 Nova Scotia 104, 132 (1900).

The second class of these cases regard this right of the father as a trust, not a power. "The best interests of the child," — its moral and spiritual welfare is made the paramount consideration, the wishes of the parent being relegated to a subordinate and very secondary place.[27]

"When infants become wards of the Court the first and paramount duty of the Court unquestionably is to consult the well-being of the infants, and in discharging that duty the Court recognizes no religious distinctions. If, consistently with the due discharge of that duty, the wishes of the father can be attended to, the Court, having regard, as I apprehend, to the power with which the law of the country has entrusted the father of appointing guardians for his children, and thereby directing and regulating their future course of life, pays attention to those wishes; but if the wishes of the father cannot be carried into effect without sacrificing what the Court, acting without bias, judges to be for the well-being of the children, those wishes cannot be attended to . . . the wishes of the father may be in conflict with the well-being and even with the safety of the children." [28]

III

Whatever may be the parents' power or privileges with regard to their children's religious education, all authorities agree that a parent may by his acts or conduct forfeit, abandon, or waive such parental rights.[29] No definite rule can be given as to what

[27] Austin *v.* Austin, 34 Beav. 257 (1865); W. *v.* M. [1907] 2 Ch. 557; *In re* Newton, [1896] 1 Ch. 740; *Re* Ullee, 54 L. T. 286 (1885); *In re* Butler, 6. N. S. W. W. N. 10 (1889); *In re* Nevin, [1891] 2 Ch. 299.

[28] Stourton *v.* Stourton, 8 DeG. M. & G. 760, 771–2 (1857).

"My difficulty resolves into this, how far the right of the father to educate his child in a particular religion can be made an element in the determination as to what is for the child's welfare. It seems to be put no higher than this, *viz.*, that regard must be had to the 'natural law which points out that the father knows far better, as a rule, what is good for his children than a Court of Justice does.' But here by statute the court has to determine what is for the welfare of the child, and the assumed knowledge of the father as to what religion it is best for the child to be brought up in is only *one* element in the determination of the question." Donohue *v.* Donohue, 1 S. R. D. 1; 18 N. S. W. W. N. 14, 18 (1901).

"It is not the benefit of the infant as conceived by the court, but it must be the benefit of the infant having regard to the natural law which points out that the father knows far better as a rule what is good for his children than a Court of Justice can." *In re* Agar-Ellis, 24 Ch. D. 317, 337–8 (1883) (per Bowen, L. J.).

[29] Witty *v.* Marshall, 1 Y. & C. 68 (1841); *In re* Clarke, L. R. 21 Ch. D. 817 (1882); *In re* O'Malley, 8 Ir. Ch. 291 (1858); *In re* Grimes, 11 Ir. Eq. 465 (1877); In matter

will amount to such abandonment, abdication, or forfeiture. It is a question of fact and will vary according to the infinite diversity of circumstances. Indeed there is perhaps no situation which has betrayed the judiciary to yield to its own religious prejudices so subtly as the issue of parental abandonment in the face of rival religious claims between parents or relatives over some poor child who had been made the object of religious zeal. No mere agreement as to the religious education of children between father and mother before or after marriage is binding and it is always open to either parent to change his mind, as it is his privilege to inculcate upon his children those religious principles which for the time being seem to him best.[30] Some decisions base this fundamental principle on a public policy that a parent in the interest of morality should not be held to bind himself conclusively to relinquish control over his children's religious education. Especially must this appeal to those who regard this right as vested in the parents solely for the benefit of their children. Other authorities, however, rest these decisions rather on the practical conditions arising out of ordinary family life.

"Who is to provide the funds to educate the children in a religion which the father objects to? Is the Court to apply the property of the husband, during his lifetime, and against his will, to the education of his child in that form of religious faith from which he conscientiously differs, and the adoption of which by the child he believes will be destructive to his eternal welfare?" [31]

It is further pointed out that for breach of a contract of a parent concerning the religious education of a child no damages can be recovered and it cannot be enforced by a suit for specific performance.[32]

Whatever view one adopts of the right of parental control over a child's religious education it is evident that irrespective of good faith and well-intentioned efforts there must be certain well-de-

of Garnett, 20 W. R. 222 (1872); Hill *v.* Hill, 31 L. J. (Ch.) 505 (1861); *In re* Marshall, 33 Nova Scotia 104 (1900).

[30] *In re* Agar-Ellis, 24 Ch. D. 317 (1883); *In re* Nevin, [1891] 2 Ch. 299; *In re* Meades, 5 Ir. R. Eq. 98 (1870); *In re* Browne, 2 Ir. Ch. 151 (1852); *In re* Clarke, L. R. 21 Ch. D. 817 (1882); Andrews *v.* Salt, L. R. 8 Ch. App. 622 (1873); *In re* Laing, 2 S. R. Eq. 121, 19 N. S. W. W. N. 219 (1902).

[31] *In re* Browne, 2 Ir. Ch. 151, 160 (1852).

[32] Andrews *v.* Salt, L. R. 8 Ch. App. 622 (1873).

fined limits restraining its capricious exercise. Once the religious education of the child has progressed so far that definite religious ideas have been impressed upon its mind to the extent that a change would unsettle its tranquillity and disturb its mental poise, the parents are precluded from further interference with the continued development of that religious education which the child had thus acquired.[33] In this connection arises one of the most perplexing questions involved on this subject, and one on which there is, perhaps, the clearest conflict of authority. How is the child's religious development to be ascertained and the possible injurious effect of a change determined? The obvious answer is to hale the child before the court and to have the judge satisfy himself by an examination of the child either in open court, in chambers, or by a master in chancery or similar official under such conditions as shall give a fair opportunity to size up the child. This has been the course adopted in perhaps a majority of the cases.[34] In certain cases this may be done without serious danger,[35] but a careful analysis of the cases is convincing that it is a dangerous practice and open to very serious objections. Perhaps nothing can be added to the summary by Judge Owen of the New South Wales Court of the evils and defects of this procedure:

"The reasoning both of the Vice-Chancellor and of the Lords Justices in that case (*Hawksworth* v. *Hawksworth*) satisfies my mind that any such examination would be a mere form, and might lead to injurious results. No doubt the child here is 13 years old, whereas the age of the children in the cases cited was only 9 years, but I cannot suppose that a girl of 13, unless brought up in a proselytising school, and prematurely instructed in matter of doctrinal controversy, as to which

[33] Hawksworth *v.* Hawksworth, L. R. 6 Ch. 539 (1871); Stourton *v.* Stourton, 8 DeG. M. & G. 760 (1857); *In re* Agar-Ellis, 24 Ch. D. 317 (1883).

[34] Hawksworth *v.* Hawksworth, L. R. 6 Ch. 539 (1871); Skinner *v.* Orde, L. R. 4 P. C. 60 (1871); F. *v.* F., [1902] 1 Ch. 688; *In re* Newbery, L. R. 1 Eq. 431 (1865); Stourton *v.* Stourton, 8 DeG. M. & G. 760 (1857); Andrews *v.* Salt, L. R. 8 Ch. App. 622 (1873); Witty *v.* Marshall, 1 Y. & C. 68 (1841); *In re* Grimes, 11 Ir. R. Eq. 465 (1877); *In re* Elliott, L. R. 32 Ir. 504 (1893); Davis *v.* Davis, 10 W. R. 245 (1862); *In re* Meades, 5 Ir. R. Eq. 98 (1871); *In re* Sparrow, 20 N. S. W. W. N. 42 (1903); *Re* Faulds, 12 Ont. L. R. 245 (1906); *Ex parte* Rowlands, 12 N. S. W. W. N. 47 (1895); In Matter of Garnett, 20 W. R. 222 (Ir.) (1872); *In re* Marshall, 33 Nova Scotia 104 (1900).

[35] Where a child was of such age that within a year she "would have a right to act on her own views" obviously her wishes should be considered by the court. Queen *v.* Gyngall, [1893] 2 Q. B. 232.

there is no evidence, can hold or be capable of forming any opinion worth considering on the matters in controversy between the two characters. Even if she had been so instructed, she might have caught the shibboleths of a party, or some of the current phrases of controversy, but of the controversy itself she could form no intelligent opinion. Subjects that held in doubt for many years the powerful and acute intellect of a Newman are outside the intellectual gauge of a girl of 13; nor can a child of that tender age, however well educated, have touched even the fringe of the learning necessary to form an intelligent opinion on so vast and complex a subject. I might find sentiment or prejudice, or dislike to any change in religious education, but the Court cannot allow such to interfere with its duty of seeing that the child is educated in the religion of her father. Nor do I consider upon principle, that a Judge who may be of any religion, or of no religion, is a fitting tribunal to ascertain the religious views of a child of tender years. The law, which is absolutely impartial in matters of religion, has to be administered by Judges, who, like other men, are liable to be swayed by their own views on this, the most important and most difficult subject that can engage the mind of man. They, as others, are to be found ranged on either side of the great controversies that have split Christendom into hostile camps. The Judge, if he entertains strong views on the subject, is liable, however he may desire to be fair and impartial, to have his judgment warped by an intense conviction of the truth of his own particular opinion, or by his disapproval of the teaching of the church to which the child's father belonged. If he is indifferent, or holds views now known as agnostic, his examination must be equally, if not more, unsatisfactory. I also attach great weight to the opinion of the Judges in *Hawksworth* v. *Hawksworth*, that if it were known that the Court would examine a child as to its religious views, before deciding in what religion it was to be brought up, a mother, or guardian, might be induced to begin prematurely to teach the child the subjects of controversy between particular churches, so as to prepare it for such examination. There are cases, no doubt, in which a child has from infancy until years of discretion been brought up in one particular form of religion, where the court may consider it dangerous to compel such child to be brought up in a different and conflicting religion, lest the diverse and conflicting teachings should make shipwreck of the child's faith, and impair its moral character. . . ." [36]

[36] *In re* Butler, 6. N. S. W. W. N. 10, 10–12 (1889). See also Reg. *v.* Clarke, 7 E. & B. 186 (1857).

"But an interview of a few minutes between a girl under nine years old and a stranger could hardly lead to my coming to any conclusion like that which the Lords

IV

While we have talked of the parental right to control the child's religious education as if it were a joint right of both parents, the power to exercise it was in fact vested in the father. Although the mother might be entitled to reverence and obedience from her children, she had no power over them. During her husband's lifetime she had no right to her children's custody, nor could she interfere with their education.[37] As we have already pointed out, after his death her rights were not greatly increased even though she became guardian.[38] If the widow happened to be of a different religious faith from that of the husband she was not only bound to educate her children in the religious faith of the deceased father rather than her own, but to insure that result the court did not hesitate to appoint persons of his religion to act with the mother as guardians.[39] It was only when her husband either abdicated or forfeited his rights, and thereupon the mother in fact had assumed the direction of the children's religious education, that the mother could exercise any legal control over the choice of her children's

Justices arrived at in Stourton *v.* Stourton. That decision may have been, and probably was, right with reference to the case of a very unusual child; but I cannot help fearing that it has done some harm. I fear it may have led widowed mothers, in breach of their duty, and to the great injury of their children, to introduce them prematurely into an atmosphere of theological controversy, than which nothing can be more injurious to the mind and heart of a child, and this, it will be observed, for the purpose of convincing them that their dead father had wrong views. In the present case I knew that although I might be bound to give the ward an opportunity of speaking to me privately, the interview must necessarily, under the circumstances, be a form, and it was a form. I did not obtain, and, in fact, I did not in any way try to elicit, any opinion from her as to the questions between the churches. If I had thought that the child had been brought up to a keen and premature consciousness of the true bearing and meaning of those questions I should have formed a much less favourable opinion of the mother than I actually formed. As it is, however much I may regret the conclusion, the law must prevail, and the child must be brought up in her father's faith." Hawksworth *v.* Hawksworth, L. R. 6 Ch. 539, 540–1 (1871).

[37] *In re* Agar-Ellis, 24 Ch. D. 317 (1883).

[38] *In re* Scanlan, L. R. 40 Ch. D. 200 (1888); *In re* McGrath, [1893] 1 Ch. 143; Petre *v.* Petre, 7 Ves. 403 (1802); Corbet *v.* Tottenham, 1 Ba. & B. 59 (Ir.) (1808); *In re* Browne, 2 Ir. Ch. 151 (1852); Austin *v.* Austin, 34 Beav. 257 (1865).

[39] *In re* Scanlan, L. R. 40 Ch. D. 200 (1888). A Canadian court, however, refused to follow to this extreme. In adjudging the mother entitled to the custody of a daughter after the father's death, the court said:

"The religious question does not enter into consideration in this matter, because the mother, having a right to bring up her child, has a right to decide what religious teaching she shall receive." *Ex parte* Ham, 27 L. C. Jur. 127, 128 (1883).

religion. It followed from this that when domestic quarrels resulted in separation of husband and wife she was legally helpless to assert any preferences in respect to her children's religious training.

"Although the wife may have obtained a decree of judicial separation, the Court will not give her the custody of the children if she intends to bring them up in a religion different from that of their father, and different from that in which they have been educated during the cohabitation of their parents. . . . If the marriage had continued undissolved, and the husband and the wife had continued to live together, she would not have been able to control the husband otherwise than by her example and influence, as to the religious education which should be given to their children." [40]

A mother of an illegitimate child controls the religious education of such child.[41]

V

Even when both parents are in accord in their views respecting the religious education of their children there must necessarily be cases where their efforts will be frustrated. The court can do nothing more than order a child to be brought up in a particular religion. No order can be made forcing the conscience of the child to accept any designated doctrines. Usually it is considered that the child's religion is controlled by the appointment of guardians or custodians of a particular religious belief confident that the religious surroundings of the child are really the determining factor.

There must occur the very practical and interesting *quære:* how far the court will protect the parents against proselytizing influences brought to bear directly upon the child from outside.

There are as yet no authoritative decisions on this question. Three cases have been found, unfortunately all not agreeing, in dealing with this problem. *Re Lyons.*[42] A daughter of Jewish parents, when 18 years of age, was induced by others to leave home and be baptized a Christian. The father had attempted to get possession of the child by force. He was restrained from retaking

[40] D'Alton *v.* D'Alton, L. R. 4 P. D. 87, 88 (1878).

[41] Bernardo *v.* McHugh, [1891] A. C. 388; King *v.* New, 20 Times L. R. 583, affirming S. C. ante, 515 (1904); Regina *v.* Bernardo, 58 L. J. (Q. B.) 522 (1889).

[42] 22 L. T. 770 (1869).

the child other than by legal proceedings. *Todd* v. *Lyons*.[43] Mr. Vice Chancellor Malins ordered the superior of a monastery to refrain from admitting a young man of 17 to monastic vows against the father's consent, and directed that he be delivered back to the father. *Iredell* v. *Iredell*.[44] Mr. Justice Kay granted an injunction restraining certain persons from communicating with a minor where they had been having secret interviews with her to induce her to adopt their religion instead of her father's.

Logically, unless justified on other grounds, *Re Lyons* must be erroneous. If the parents have the legal right, or even a trust to discharge, to inculcate some proper religious training in the minds of their children, in so doing they have the right to be free from the officious meddling of strangers no matter from what highly disinterested motives such interference may be inspired.

VI

In the United States the constitutional limitations[45] against any established religion have fortunately suggested a different judicial approach to religious litigation.

"In this country, the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." [46]

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[43] Unreported, see SIMPSON, LAW OF INFANTS, 3 ed., 127.

[44] 1 Times L. R. 260 (1885).

[45] U. S. CONST., First Amendment.

Practically every state constitution has a provision to insure religious liberty and equality before the law of all religions. Thus in Massachusetts:

"It is the right as well as the duty of all men in society, publicly, and at stated seasons, to worship the SUPREME BEING, the great Creator and Preserver of the universe. And no subject shall be hurt, molested, or restrained, in his person, liberty, or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience; or for his religious profession of sentiments; provided he doth not disturb the public peace, or obstruct others in their religious worship." MASS. CONST., pt. 1, art. 2

". . . all religious sects and denominations, demeaning themselves peaceably, and as good citizens of the commonwealth, shall be equally under the protection of the law; and no subordination of any one sect or denomination to another shall be established by law." Amendment XI, MASS. CONST. See STIMSON, AMERICAN STATUTE LAW, §§ 40, 42, 43.

[46] Watson *v.* Jones, 13 Wall. (U. S.) 679, 728 (1871).

The result is that our courts have been remarkably free from litigation over the religious education of children. It is only in very recent years that it is beginning to make its appearance. Most of the states — even a state so important as New York [47] — are still without any decisions on the subject from a court of last resort. Such litigation as has arisen has either been decided by side-stepping the religious aspects of the controversy altogether and resting the decision on some other grounds entitling one or the other party to custody of the infants,[48] or, too often, in more or less slipshod fashion the court has treated the matter as if it were a novel issue to be decided as law of first impression, or has fallen into an undiscriminating citation of an English authority to justify some particular disposition of the case under consideration. In recent years, as the minority religious groups have strengthened themselves they have more aggressively asserted a right to protect from proselytism the children of their faith who come before the courts for disposition usually as dependent, delinquent, or neglected children. Generally, however, these efforts have been directed toward securing legislative enactment imposing limitations upon the courts or public authorities in the indiscriminate placing of children of some particular faith in conflicting religious surroundings.[49]

The divergence between the standards of American courts is perhaps illustrated by a contrast of three cases. First, a Florida court adopted a rule that "It is not enough to consider the in-

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[47] The New York decisions, five in number, all of inferior courts, lack distinction and contribute little or nothing to define the position which the courts of the state will ultimately take. Matter of Marcellin, 24 Hun 207; Matter of Jacquet, 40 Misc. 575, 82 N. Y. Supp. 986 (1903); Matter of Crickard, 52 Misc. 63, 102 N. Y. Supp. 440 (1906); Matter of McConnon, 60 Misc. 22, 112 N. Y. Supp. 590 (1908); Bolling *v.* Coughlin, 5 Redf. 116 (1881).

[48] Desribes *v.* Wilmer, 69 Ala. 25 (1881); Whalen *v.* Olmstead, 61 Conn. 263, 23 Atl. 964 (1891); People *v.* Gates, 43 N. Y. 40 (1870); *In re* Northern Pac. P. B. of M. *v.* Ah Wan, 18 Ore. 339, 349, 22 Pac. 1105 (1890).

[49] It has been said that statutes of this class are "not made with any view to the external interests of the child in a future state of existence, but with a view to the rights and feelings of the parents." *In re* Doyle, 16 Mo. App. 159, 167 (1884).

For example see:

Pennsylvania. 1 PURD. DIG., 13 ed. 1084; Parks's Estate, 7 D. R. 700 (1898); Appeal of McCann, 49 Pa. St. 304 (1865); Nicholson's Appeal, 20 Pa. St. 50 (1852).

Missouri. REV. STAT. MO., § 5295; Voullaire *v.* Voullaire, 45 Mo. 602 (1870); *In re* Doyle, 16 Mo. App. 159 (1884).

Massachusetts. ACTS 1904, c. 363; ACTS 1905, c. 464.

terest of the child alone. And as between father and mother, or other near relation of the child, where sympathies of the tenderest nature may be confidently relied on, the father is generally to be preferred"; that the father has the legal right to have his children educated in any religious faith that he sees proper whose tenets do not inculcate violations of law.[50] The Massachusetts court[51] announces as its fundamental doctrine that "the court will not itself prefer one church to another, but will act without bias for the welfare of the child under the circumstances of each case." — "The wishes of the parent as to the religious education and surroundings of the child are entitled to weight; if there is nothing to put in the balance against them, ordinarily they will be decisive. If, however, those wishes cannot be carried into effect without sacrificing what the court sees to be for the welfare of the child, they must so far be disregarded."

In the third case — in Wyoming — it was held that in view of the statutes prohibiting distinctions being made on account of religious belief in awarding custody of minor children, religious considerations will not be given "the slightest weight in our decision," although "some reputable courts" have considered such differences of religion.[52] This almost goes to the extremes of a Victoria court which ordered a minor placed at an institution where she might have experience of both the Catholic and Protestant religions so that she might be able to have "a free means of exercising her own judgment" until ultimately she adopted some fixed views.[53]

As the law develops in American jurisdictions it will probably enlarge the mother's authority over her children's religious education. It is to be expected that it will be recognized that it is equal to that of the father. As between father and mother, any religious question respecting the child's religion will be settled by the award of the right of custody. Already it is safe to predict that if the question of the right and duty of a surviving mother concerning the religious education of her child should arise the courts will probably follow the Canadian case rather than the English authorities[54] and hold that where the surviving mother has the

[50] Hernandez *v.* Thomas, 50 Fla. 522, 536, 39 So. 641, 645 (1905).

[51] Purinton *v.* Jamrock, 195 Mass. 187, 199–200, 80 N. E. 802, 805 (1907).

[52] Jones *v.* Bowman, 13 Wyo. 79, 77 Pac. 439 (1904).

[53] *In re* Pennington, 1 V. L. R. Eq. 97 (1875); S. C. 2 V. L. R. Eq. 49 (1876).

[54] See n. 39.

right of custody she has a right to dictate the religious teachings the child shall receive irrespective of any question of the father's religion or his possible wishes on the subject.

A desirable American innovation in the not unusual domestic religious situation in many of these cases has already been promulgated by the New Jersey court. It was held that in the absence of any expressed preference and direction by a deceased father as to the religious education of his child, the clearly expressed wishes of a deceased mother should be followed.[55]

The Missouri court had a more startling and more novel proposition presented to it in an attempt to obtain an injunction to compel a father to baptize his child in accordance with an antenuptial contract with the deceased wife. It was, of course, refused.[56]

To the very limited extent that they have as yet considered the subject, the courts seem to have allowed an examination of the child in these cases.[57]

It is evident in view of the paucity of authority on this subject in the United States that a thorough understanding and analysis of the English decisions in the pioneer American cases will enable our courts to avoid difficulties and false standards that will only confuse and increase a troublesome class of litigation that is now beginning to force itself on the attention of our judges.

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[55] *In re* Turner, 19 N. J. Eq. 433 (1868).

It was held, however, in Hernandez *v.* Thomas, 50 Fla. 522, that the will of the mother undertaking to give custody of her children, even though she was divorced and had been awarded custody of her child, was of no effect; that a father alone had testamentary power to appoint a guardian for an infant child.

[56] Brewer *v.* Cary, 148 Mo. App. 193, 127 S. W. 685 (1910).

[57] Matter of McConnon, 60 Misc. (N. Y.) 22, 112 N. Y. Supp. 590 (1908); *cf.* Curtis *v.* Curtis, 5 Gray (Mass.) 535 (1855).